

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.260 of 1994

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Indal Kumar

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Sushil Kumar Singh, *Amicus Curiae*

For the Respondent/s : Mr. S.N. Prasad, APP

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CORAM: HONOURABLE MR. JUSTICE AJAY KUMAR TRIPATHI

and

HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

C.A.V. JUDGMENT

(Per: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA)

Date: .12.2017

Nobody appears on behalf of the appellant, as such, Mr. Sushil Kumar Singh, learned counsel, is appointed *Amicus Curiae* to assist the Court.

2. This appeal is directed against the judgment dated 13.04.1994 and order of sentence dated 15.04.1994, passed by Sri Jaleshwar Ram, Additional Sessions Judge, - XII, Patna, in Session Trial No. 116 of 1992, by which he has convicted the appellant under Section 302 of Indian Penal Code and Section 27 of the Arms Act and sentenced him to undergo rigorous imprisonment for life under Section 302 of Indian Penal Code and rigorous imprisonment for three years under Section 27 of the Arms Act. Both the sentences were directed to run concurrently. By the said judgment, trial court acquitted other co-



accused, namely, Rameshwar Singh from the charge levelled against him.

3. Brief facts necessary for adjudication of the present appeal are that the informant Sarjug Singh, gave his written information to the officer in-charge, Gardanibagh, police station on 30.11.1991 alleging that on the same day at about 7 A.M., his Nati (maternal grand son) Pankaj Singh, of Tahirlane under the Gardanibagh police station, came at his house for taking milk and had gone on the roof for playing and at about 7.45 A.M. appellant – Indal Kumar of village – Dhakanpura, came to the house of informant and he too went on the roof and, thereafter, the informant heard a sound of firing and saw the appellant – Indal Kumar, fleeing away. The informant then rushed towards the roof and found the said Pankaj Kumar, lying in pool of blood. It has also been alleged that the informant came to know from the women members of the house that appellant had shot the said Pankaj Kumar, thereafter, he was taken to the PMCH hospital. Informant claimed that the appellant intentionally fired on his *Nati* Pankaj Kumar.

4. On the basis of above written statement, Gardanibagh P.S. Case No. 959/91 was registered under Section 307 of Indian Penal Code and Section 27 of the Arms Act against the appellant. However, later on the injured Pankaj Kumar succumbed to his injuries, Section 302



of Indian Penal Code was added and as per the order of Chief Judicial Magistrate, Section 120B of Indian Penal Code was also added.

5. Police after investigation submitted charge-sheet against the appellant under Section 302/120B of the Indian Penal Code and Section 27 the Arms Act against the appellant and one Rameshwar Singh.

6. Cognizance of the offence under Section 302, 120B of the Indian Penal Code and Section 27 of the Arms Act, was taken by the CJM, Patna the case was committed to the court of sessions, which ultimately traveled to the file of Sri Jaleshwar Ram, Additional Sessions Judge, - XII, Patna, for trial and disposal.

7. Charges were framed under Section 302 of the Indian Penal Code and Section 27 of the Arms Act against the appellant and Section 302/120B of the Indian Penal Code against the co-accused Ramashing Singh.

8. In this case altogether eleven, witnesses have been examined from the side of the prosecution and they are: P.W. 1- Awadh Bihari Singh, P.W. 2- Bachu Singh, P.W. 3- Sarjug Jha, P.W. 4- Geeta Kumari, P.W. 5- Sarda Devi, P.W. 6- Sarjug Singh (informant), P.W. 7-Ram Kripal Singh, P.W. 8- Chitranjan Singh, P.W. 9- Dr. Suniti Kumari, P.W. 10- A.S.I. Madan Mishra and P.W. 11- S.I. Jogendra Pd. Singh.



9. Apart from the above, following documents have been admitted into evidence and marked as ; Ext. 1 – Written report, Ext. 1 to 2/1 – Signature of Chitranjan Singh and Sarju Singh on the inquest report, Ext. 3 – Postmortem report, Ext. 4- F.I.R, Ext. 5 – Endorsement on written report, Ext. 6 to 6/1 – Seizure list and Ext. 7 – Requisition for adding Section 302 of Indian Penal Code.

10. From the defence side also one witness has been examined, who is D.W. 1 – Gautam Trivedi.

11. Also following document was admitted and marked as Ext. A – Fardbeyan of Chitranjan Pd. Singh.

12. It appears that the defence of the appellant as per the statement of the appellant under Section 313 Cr.P.C, is of false implication and of innocence and further defence is that deceased Pankaj Kumar was playing with the pistol and P.W. 4, Reeta Kumari tried to snatch the pistol, in that course, it got fired, which hit the Pankaj Kumar and caused injury to him.

13. Learned Trial Court after conclusion of trial convicted the appellant under Section 302 of the Indian Penal Code and Section 27 of the Arms Act and sentenced him as stated above.

14. Aggrieved by the said judgment, the appellant preferred the present appeal.

15. In this case P.W. 6 is the informant and he has stated in his



evidence that the occurrence is of 30.11.1991. At about 7.45 A.M. his daughter Sarda Devi and *Nati (Maternal grand son)* Pankaj Kumar had come to his house for taking milk. They went on the roof of the house, then, appellant – Indal Kumar also went on the roof of the house, thereafter, he heard the sound of firing and saw the appellant fleeing away with a pistol in his hand. He, then went on the roof and found Pankaj Kumar lying in a pool of blood. Sharda Devi and Geeta Devi disclosed him that Indal Kumar had fired on the Pankaj Kumar. On hearing, the sound of firing some neighbors assembled there, who took the injured Pankaj Kumar to the P.M.C.H, where he died. Even in his cross examination in para -8, he has stated that he had seen Sarda Devi and Pankaj Kumar came to take milk, however, he could not state the same in his written statement.

16. P.W. 5, Sarda Devi, is mother of the deceased Pankaj Kumar and she has stated in her evidence that on the date of occurrence, she along with the deceased had come to her father's house for taking milk. They both had gone on the roof of the house. Deceased was talking to her maternal aunt on the roof. At about 7.45 A.M., She saw appellant Indal Kumar @ Chengra rushing towards the roof with a pistol in his hand and then she also went on the roof and saw appellant Indal Kumar @ Chengra fired on the Pankaj Kumar and Pankaj Kumar after receiving gun shot injury, fell on the roof. Thereafter,



other family members assembled there and Pankaj Kumar was taken to P.M.C.H., where he died in course of his treatment. Her evidence in para – 10 also shows that no will was executed by her father in favour of her son or the son of her sisters.

17. P.W. 4 Geeta Kumari also claims herself to be eye witness of the occurrence and her evidence disclosed that she and Pankaj were on the roof and Indal Singh @ Chengra came there with a pistol, in the mean time, her sister Sharda Devi (P.W. 5) also came on the roof and, thereafter, Indal Singh @ Chengra fired on the Pankaj causing injury to him and on the sound of firing her father Sarjug Singh (P.W. 6), Bachu Singh (P.W. 2) and Rita Devi another sister, came on the roof top and she informed them about firing by the Indal Singh @ Chengra and they had also seen Indal Singh @ Chengra, fleeing away with pistol in his hand. Her evidence in para -4 shows that Rita has also one child and Pankaj was the son of elder sister Sarda. Her evidence in cross-examination in para -9, shows that Pankaj used to come daily to her house. Her evidence in para -11 shows that Indal Singh @ Chengra used to come to her house. She has also stated in para -14 of her cross – examination that she had disclosed the details of occurrence to her father and in para – 16, of her evidence shows that eye of Pankaj was open but he was not able to talk to anybody. She has also denied a suggestion in para -9 that the time when Pankaj



received Injury, She and Sharda Devi were not on the roof. Further she also denied a suggestion in para 21 that Pankaj was playing with the pistol and as she tried to snatch the same, it accidentally got triggered and got fired.

18. Apart from P.W. 4, 5, and 6 other witnesses have also been examined in this case.

19. P.W. 1 is Awadh Bihari Singh and P.W. 3, Sarjug Jha, claims in their evidences that they received information about the occurrence and on information, they went to P.M.C.H, there Pankaj Kumar was conscious and he disclosed him that Indal Singh @ Chengra fired on him.

20. P.W. 2 is the uncle of informant and he has stated in his evidence that on hearing the sound of firing, he came running there and saw Indal Singh @ Chengra fleeing away from the place of occurrence having pistol in his hand and on roof top he saw Pankaj in an injured condition. His evidence in para – 3 shows that his house is in the same building where informant resides. Even in his cross-examination, he withstood the test of cross-examination and stated that he saw Indal Singh @ Chengra in the Aangan.

21. P.W. 7 is not an eye witness of the occurrence and his evidence disclosed that on information he went to PMCH and he has also stated that Pankaj Kumar disclosed to Chitranjan Singh (P.W. 8) that there



is pain in his abdomen and he also disclosed that Indal Mama had fired on him. Evidence of this witness in para -7 shows that at that time others were also present there.

22. P.W. 8 Chitranjan Singh, is the grandfather of deceased – Pankaj Kumar and he is also not the eye witness of the occurrence and he has also stated that when in the P.M.C.H., Pankaj told him that he has pain in his abdomen and on being enquired, he disclosed that Indal had fired on him. Even in his cross-examination, his evidence disclosed that deceased had talk with him.

23. P.W. 9 is the Doctor, who conducted post mortem examination on the dead body of the deceased and his evidence shows that following ante mortem injuries were found.

(i) Lacerated wound 7"x2" over lateral aspect of left arm. Muscle were found lacerated. Bone and elbow joint was exposed. In the middle of the wound, blackening was found over skin surface.

(ii) Lacerated wound 7"x2" over medial aspect of left arm. Muscles were found lacerated and bone and elbow joint were exposed/

(iii) lacerated wound 1"x1" abdominal cavity deep over left flank of abdomen 7" from middle anteriorly and 5" above anterior superior iliac spine. Intestinal loop was coming out through its margin of the wound was found lacerated and inverted, that was the wound of entry.



(iv) Lacerated wound $\frac{1}{4}$ " x $\frac{1}{4}$ " abdominal cavity deep over right lumbar region of abdomen. Posterily 6" from midline and posteriorly 3" above iliac crest. Margin of the wound was lacerated inverted, wound of exit.

On dissection abdominal cavity was found full of blood. Injury No. 1 to 4 were found in a track passed through lateral aspect of the left arm medial aspect of left arm then continuing as injury no. 3., then spleen was lacerated then loops of small intestines were found lacerated and pierced at four different places and passing through injury no. 4. All abdominal and chest vecera were found pale. Heart was empty over both sides. Bladder and stomach. In his opinion, the time elapsed since death was within 24 hours. Cause of death was hemorrhage and shock due to above injuries. Nature of weapon causing injury viz. such as fire arm. All the injuries were dangerous to life. He proved the injury report written and signed by him marked as Ext. 3.

24. P.W. 10 is the I.O. of this case and his evidence shows that he found blood fallen on the roof top and it continued to the stair case upto sixty feet. He has also seized the blood stained bed sheet (lethara) and one empty cartridge and prepared seizure list. He has also stated in para -6 of his evidence that when he reached P.M.C.H., he received fardbeyan of Chitranjan Singh (P.W. 8) and nobody has



informed him about Sarju Jha, P.W. -1. His evidence in para -8 also shows that Chitranjan Singh (P.W. 8) in his restatement has stated that when he went to P.M.C.H., he found the deceased in unconscious condition and the disclosure made by the boy was not heard by any other person.

25. P.W. -11 is another I.O. in this case and he received post mortem report and also recorded the statement of Bachu Singh (P.W.2) and Sarju Singh (P.W. 6).

26. On behalf of the defence also one witness has been examined, namely, Gautam Trivedi and from his evidence, defence has tried to support the story that this witness heard the sound of firing and the villagers went there and they brought Pankaj in injured condition and were talking as to where they would take him. He has also stated that Rita and Indal were trying to snatch the pistol from the hand of Pankaj and in that course it accidentally got fired and hit the Pankaj but this witness has admitted in his cross-examination that he has not gone to place of occurrence and he appears to be a hearsay witness.

27. Defence has also brought fardbeyan of Chitranjan Singh (P.W. 8) to show that no such disclosure was made by the deceased to him.

28. Before the Trial Court, appellant has taken a plea that at the time of alleged occurrence, he was a juvenile, however, the Trial Court has rejected the said plea of the appellant on the ground that he



was aged about 20 years at the time of occurrence and as such, he was above sixteen years of age at that time. It further appears that the said plea has also been taken by the appellant during the pendency of the case in the court below before commitment and same was also rejected by the court below on the ground that certificate submitted by the appellant in support of his proof of age, was found forged.

29. In this case Trial Court has acquitted co-accused Rameshwar Singh from the charge under Section 302/120B of the Indian Penal Code and no appeal has been preferred by the prosecution against the acquittal of said co-accused, as such, so far fact with regard to conspiracy of murder by the Rameshwar Singh is concerned, finding recorded by the Trial Court does not require any interference.

30. Learned counsel for the State, on the other hand, that there are consistent evidence of P.W. 4 and 5, who are the eye witness of the occurrence supported by the evidences of other witnesses, are on record to prove that it is the appellant, who fired on the deceased causing his death. Further evidences of these witnesses have been corroborated by the evidence of Doctor (P.W. 9) as well as by the post mortem report, which shows that one gun shot injury was found on the person of the deceased. It has also been submitted that though the Trial Court has not relied upon the evidence of P.W. 1 to 3 as well as the evidence of P.W. 8 claiming that deceased disclosed him that



Indal Singh @ Chengra had fired on him, however, there is nothing on record to doubt their testimony. As such there is no infirmity in the impugned judgment and the conviction of appellant is just and proper.

31. Thrust of the argument of learned *Amicus Curiae* is that there is no eye witness of the occurrence and though P.W. 4 and P.W. 5 claim themselves to be eye witness of the case but F.I.R. is the earliest version, which does not show the name of P.W. 4 and 5 as witness of the occurrence rather it is stated there that female members of the family informed the informant that Indal had fired on the Pankaj, as such learned Trial Court has erred in accepting that they are eye-witness of the occurrence. It is well established that F.I.R. is the earliest version and it is not necessary that all the minute details shall be incorporated in the F.I.R. specially when the informant was in a state of shock as his own kith was shot but in spite of that he has stated that female members of the family disclosed to him that it was Indal, who fired on the Pankaj and P.W. 4 and 5 are the female members of his family as they happened to be daughter of the informant and their presence was quite natural. Learned trial court has also discussed the above point raised by appellant in its judgment and rejected the above contention, relying upon the decision of Hon'ble Apex Court in the case of **Dharam Ram Bhagre v. State of Maharashtra** reported in [AIR 1973 SC 476], wherein considering



the importance of F.I.R, the Hon'ble Apex Court has held F.I.R is never treated as substantive piece of evidence and it can only be used for corroborating or contradicting its maker when he appears in court as a witness. It has further been observed that prosecution case cannot be thrown out on the mere ground that in the F.I.R, altogether different version is given by its maker. Trial court has also relied upon a judgment of Hon'ble Apex Court in the case of **Hasib v. State of Bihar** reported in [AIR 1972 SC 283]. Considering the ratio of above judgments, it is manifest that on the basis of said omission in F.I.R, the entire prosecution case, cannot be brushed aside. Moreover, as discussed above, the said omission is not vital and does not make the prosecution case unbelievable. As such, there is no force in this submission of learned *Amicus Curiae*.

32. Further contention of learned *Amicus Curiae* is that P.W. 5 was eye witness of the occurrence, which will appear from the fact that she has admitted in her evidence that she had not gone to the hospital with the injured, which is not expected from a mother and that creates a doubt about her presence on the place of occurrence. Further learned *Amicus Curiae* has drawn our attention towards the contradiction in her evidence and also contradiction from the evidence of P.W. -4, as from close scrutiny of evidence of P.W. 5, it appears that her evidence in chief shows that she went behind the appellant, seeing pistol in his



hand, whereas, P.W. 4 and her own evidence in cross-examination, shows that she was on roof. No doubt her evidence in chief shows that when she saw Indal going with pistol on the roof top she also followed her to roof top and saw the occurrence and this contradiction is vital and it is also not mentioned in the F.I.R that shows that P.W. 5 is not coming with true facts and being mother of the deceased, she has made developments in this case, in order to implicate the appellant due to enmity.

33. It is well established that discrepancies in cross-examination of a witness is bound to occur and also when P.W. 5, was deposing in the Court after a long time, exact retention as well as its presentation in the court is not expected to maintain a verbatim narration unless the witness is a tutored one. Learned trial court relying upon a decision of Hon'ble Apex Court in the case of **State of U.P. v. A. K. Anthony** reported in [**AIR 1985 SC 48**], in which Hon'ble Apex Court, considering the Section 3 of Evidence Act, held that minor discrepancies on trivial matter, not touching the core of the case, hyper technical approach by taking sentence torn out of contents here and there from the evidence, attaching much importance to those errors committed by the Investigating Officer not going to the root of the matter, would not originally permit rejection of the evidence as a whole and further held that even the honest and truthful witness may



differ in some details unrelated to the main incident because of power of observation retention and re-production differ with individuals. Cross examination is unequal duel between a rustic and refined lawyer. Further Hon'ble Apex Court in the case of **Inder Singh and Another v. State of Delhi Administration** reported in **1978 Cr.L.J. 766**, held that consideration of judicial evaluation of the totality, not isolated scrutiny is required. While it is necessary that proof beyond reasonable doubt should be adduced in all criminal cases. It is not necessary that it should be perfect. Proof beyond reasonable doubt is a guideline.

34. Considering the law laid down by the Judgment of Hon'ble Apex Court as discussed above as also materials available on record, it appears that P.W. -5 is the daughter of the informant and her case is that on the alleged date of occurrence, she had also come with the deceased Pankaj Kumar at the house of informant to take milk as such, her presence is quite natural. Investigating Officer has also stated in his cross-examination that P.W. 5 had stated before him that at that time, she was in the room over the roof, hence her earliest version also shows her presence at the place of occurrence. It has also come in the evidence of P.W. 5 that as her sister was going to her *Sasural* on that day, she had come with the Pankaj Kumar to meet her and that also supports her presence at the place of occurrence and so



far minor contradiction in cross examination about her presence at the place of occurrence is concerned, that can be result of art of cross-examination of the defence lawyer. Her evidence also disclosed that she wanted to go to the hospital with the Pankaj but as other family members did not allow her to go with the injured, she did not go with them, however, later on she had gone to the hospital with her sister. Further she had narrated whole story of firing by the appellant on the Pankaj causing injury to him and this evidence has been corroborated by the evidence of P.W. 4, who was also present at the time of occurrence on the roof and her evidence also discloses that she was an eye witness. Even the evidence of P.W. 6, who is informant in this case also disclosed the presence of P.W. 5 Sarda Devi. All the evidence discussed above, manifest that she was present at the time of occurrence at the place of occurrence.

35. Learned *Amicus Curiae* has also come with a submission that the evidence of P.W. 4 if compared to the evidence of Doctor P.W. 9, it clearly appears that she is also not the eye – witness of the occurrence as her evidence discloses that firing was made from a distance of 5 to 6 ft. but evidence of Doctor clearly suggests that blackening may be caused even in on firing from a distance of 50 ft. and also on the ground that P.W. 4 even after seeing the appellant with pistol did not make any attempt to stop him from firing on the



deceased, which is not a natural conduct of any human being.

36. On consideration of evidence of P.W. 4, it appears that she had categorically stated that she was talking with the Pankaj Kumar and they were looking towards the *Mandap*, which was under construction near her house, as such, she could not see the appellant with pistol. So far another contention of learned *Amicus Curiae* is concerned, the Doctor (P.W. -9) has been cross –examined and in cross-examination, he has stated that this is not a fact that the blackening or charring on the injury may be caused due to firing from a short distance of 3 ft. only . Blackening and charring are two different signs, blackening may be caused by the shot at the distance of 50 ft also, whereas, charring can be found from firing at distance of 3 ft. also and sometime in some long distance also and that it depends on the use of different types of weapon and he has clearly stated that “ I cannot say exact distance of causing charring mark on the wound”. As such, the evidence of Doctor (P.W. 9), does not show that only from firing at a distance of 50 ft. blackening/charring is caused. At the same time, on examination of evidence P.W. 4, it also appears that she has not stated that firing was made from a distance to 5 to 6 ft. rather her evidence is that she was standing at the distance of 5 to 6 ft.

37. In this case, evidence of P.W. 4 clearly suggests that place of occurrence is the roof top of the house of informant and Investigating



Officer (P.W. 10) has also found blood at the roof top as well as a trail of blood from roof to stairs upto 60 ft. and that also supports the evidence of P.W. 4.

38. P.W. 1, 2 and 3 has come with different prosecution story that the deceased had disclosed the name of appellant in the hospital, however, the earliest version of Chitranjan Pd. Singh (P.W. 8) has been exhibited as Ext. A at the instance of defence and that does not show that deceased has disclosed the same and there is no prosecution story also like that. In such view of the matter, their evidence does not appear to be reliable so far story of disclosure made by the deceased in the hospital.

39. Learned *Amicus Curiae* has also argued that in this case, as per prosecution, motive behind the occurrence is that informant, P.W. 6 was going to execute a will in favour of his maternal grandson, which was not acceptable to co-accused Rameshwar Singh, hence he in collusion with appellant got Pankaj killed, however, evidence clearly shows that no will was executed. Evidence further shows that P.W. 6 had two other daughter also and one of them also had a son. However, the aforesaid story was disbelieved by the learned Trial Court and Rameshwar Singh was acquitted from the charge under Section 302/120B of the Indian Penal Code and there is no appeal preferred against the same, as such, there is no motive remained for the



appellant to commit such an offence that makes whole prosecution case doubtful and not free from reasonable doubt. No doubt, in any prosecution, motive plays an important role and once motive fails, the prosecution case also comes under the purview of suspicion, however, it differs from case to case, specially where eye witness of the occurrence available on record and their evidence are consistent and impeccable. The same has also been corroborated by the evidence of Doctor as well as other witnesses and there is admission of appellant also with regard to his presence at the place of occurrence, whole prosecution case cannot be thrown to dustbin only because the prosecution has failed to establish the motive of occurrence.

40. Considering the discussions made above, there are ample consistent and impeccable evidences available on record showing that P.W. 4 and 5 are the eye witness of the occurrence and they have supported the prosecution case. So far manner of occurrence and place of occurrence is concerned that clearly establishes firing by the appellant causing injury to the Pankaj, who later on succumbed to his injuries and their evidences have further been corroborated by the evidence of P.W. 6 and 3, who had also seen the appellant fleeing away with pistol in his hand, soon after the occurrence and the evidence of doctor also supports the prosecution story. Hence there are convincing and clinching evidence available on record against the



appellant.

41. Considering the entire discussions made above, we do not find any infirmity in the judgment dated 13.04.1994 and order of sentence dated 15.04.1994, passed by Sri Jaleshwar Ram, Additional Sessions Judge, - XII, Patna, in Session Trial No. 116 of 1992 and the same is hereby upheld.

42. Accordingly, this appeal is dismissed.

43. As the appellant is on bail, he is directed to be taken into custody to serve the remaining sentence.

(Ajay Kumar Tripathi, J)

(Vinod Kumar Sinha, J)

sunil/-

AFR/NAFR	AFR
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